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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 81

THE ALTON RAILROAD COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, BALTIMORE & OHIO RAILROAD COMPANY, ET AL.,
Appellees.

REPLY BRIEF ON BEHALF OF APPELLANT.

SILAS H. STRAWN,
FRANK H. TOWNER,
Solicitors for Appellant.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

INDEX.

	Page
The Facts	2
The Jurisdictional Question	3
The Merits	5

Cases Cited.

Manufacturers Ry. Co. v. United States, 246 U. S. 457	3
Minnesota Western R. Co. v. A. T. & S. F. R. Co. 109 I. C. C. 127	6
United States v. A. & S. Ry. Co. 265 U. S. 274	4
United States v. New River Co. 265 U. S. 533	3
Waverly Oil Works v. Penna. R. Co. 28 I. C. C. 621	6

Statutes Cited.

Act to Regulate Commerce, Section 15 (7), U. S. C. A. Title 49, Sec. 1 to 15a, p. 433	10

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MAY IT PLEASE THE COURT.

We have been served in this case with a brief on behalf of appellees, United States and Interstate Commerce Commission. The appellee railroad companies have apparently filed no brief. We wish to submit a short reply to the brief on behalf of the United States and the Commission, calling attention to a few of the errors in fact and law that it contains.

1. The Facts.

On page 9 of appellees' brief it is said:

> "These rates * * * were voluntarily established by the carriers themselves."

The same statement is made at page 26. The majority report of Division 5 (R. 33) is cited as authority for this statement. The report in question does not so state. It is said:

> "There is no showing that any of these rates, from Peoria and Pekin to eastern destinations, were established pursuant to a finding or order of the Commission under Section 15 (1) or (3)."

There is nothing in the evidence or reports of the Commission which supports the statement that the non-transit rates were voluntarily established by the carrier.

On page 10 of appellees' brief, it is said that when the eastern lines receive the traffic at Chicago from any line other than that of appellant, they receive the full amount of the "reshipping" rate from Chicago to the east. The same statement is made at the top of page 55 of that brief. Both statements are in error. The record before the Commission shows (R. 167, 168) that on traffic moving under the "reshipping" rates from East St. Louis to eastern territory, via Chicago, the lines between East St. Louis and Chicago receive 23 per cent and lines east of Chicago 67 per cent of the rates.

Out of the "reshipping" rate of 34.5 cents per hundred pounds from St. Louis and East St. Louis to New York, the St. Louis-Chicago lines, including appellant, thus receive 7.9 cents per hundred pounds, while the lines from Chicago to the east receive 26.6 cents per hundred pounds, or 3.9 cents per hundred pounds less than their "reshipping" rate of 30.5 cents per hundred pounds from Chicago to the east. The record contains no justifi-

cation for the different treatment given the lines hauling the traffic from Peoria-Pekin to Chicago.

2. The Jurisdictional Question.

In discussing the question of a court's jurisdiction under the bill in this case, appellees' brief cites no cases other than those cited in our main brief. It is only said that those cases in which jurisdiction was refused govern the case at bar and that those cases in which jurisdiction was taken have no application. Some statements are made, however, which are not supported by the cases cited.

Thus, in discussing the *Manufacturers Railway Company Case,* 246 U. S. 457, it is said, at page 31 of appellees' brief, that that case controls this one because here appellant asked the Commission to exercise its administrative function by fixing new divisions, but the Commission refused to do so. The argument overlooks the fact that in the *Manufacturers Railway Case,* the Commission permitted the payment of stated amounts to the Manufacturers Railway, and the court was asked to substitute other amounts therefor. In this case there is no request by appellant that the court fix any amounts to be received by appellant. The argument also overlooks and ignores the present statutory duty of the Commission to fix reasonable and just divisions.

In discussing the *New River Company Case,* 265 U. S. 533, it is said at page 33 of appellees' brief that the order in the case at bar is negative both in form and substance because it made no change in the existing status. This was also true in the *New River Case,* for there also, the only order made by the Commission did not require any change in the then existing status, since it only dismissed the complaint of the parties who afterwards appealed to the courts.

At page 34 of appellees' brief it is said that an injunction restraining the Railroad Defendants from applying the present divisions would not restore any previously existing divisions. But this fact does not control, for as pointed out in our main brief (pp. 44, 45), this was true in a number of cases in which this court assumed jurisdiction, and would also have been true had the Commission entered an order requiring in terms that the present divisions be maintained and had that order been set aside.

On page 34 of the brief, it is indicated that the case at bar not only,—

> "urges that the divisions that the Commission has declined to change are unjust and unreasonable, but invites the court to exercise administrative functions * * *."

This is incorrect. We do contend that the divisions of the "reshipping" rates approved by the Commission are unjust and unreasonable on their face, but we also contend that they violate appellant's constitutional rights and thus run counter to the rule laid down by this court in *United States* v. *A. & S. Ry. Co.*, 265 U. S. 274, that divisions must be high enough to avoid a confiscatory result. But we do not ask the court to exercise any administrative function. It is not asked to consider the evidence and say what divisions are proper. We only ask that our statutory and constitutional rights be protected and certainly a court has power and jurisdiction to do this in a proper case.

We wish to make it plain that we do not deny the primary jurisdiction of the Commission to fix divisions of joint rates. We do maintain, however, that this power of the Commission is not so final and conclusive that it can be successfully used as a justification for what is on its face an unjust and unreasonable action, producing a violation of statutory and constitutional law.

3. The Merits.

In discussing the merits of this case, a number of erroneous conclusions are reached in appellees' brief. On page 40 of that brief it is said that it is evident from the report of the Commission on rehearing that appellant did not urge increased divisions on the ground that it was in weak financial condition. There is no support in the record for this statement. It is obvious from the first report of the Commission that the financial status of appellant was urged upon the Commission (R. 30). The fact that the ownership of appellant's stock had changed hands between the first and second hearings before the Commission (R. 42) would not, in itself, operate to improve its financial condition, and there is no evidence of record that it did so. Appellees' brief cites no authority for the statement made.

On page 41 of appellees' brief, it is said that there are junctions other than Dwight, Joliet and Chicago via which the "reshipped" traffic can move over the Alton and via which the routes are as short, if not shorter. This statement is contrary to the record. As we pointed out in our main brief (pp. 67, 68, 69), the other junctions referred to are south and west of Peoria-Pekin and moving traffic via those junctions to eastern points would increase the mileage, as the traffic would move initially in a direction opposite to that in which it should go to reach its destination.

On pages 41 and 42 of appellees' brief, it is pointed out that there are other railroads which can handle the traffic now handled by appellant under the "reshipping" rates in issue. The argument made resolves into the conclusion that because these other lines can furnish transportation between Peoria-Pekin and the eastern points, appellant should not be permitted to furnish it. Under

this theory, all Peoria-Chicago lines should be prevented from handling the traffic, as should also those eastern lines which do not have rails to Peoria-Pekin. Yet those eastern lines desire to participate in the traffic (R. 109) and admit the right of appellant to participate in it (R. 140).

Followed to its logical conclusion, appellees' theory would eliminate all competition between carriers. Based on it, we might say with equal propriety that since appellant has a perfectly good railroad between Peoria-Pekin and Chicago, all other railroad companies should discontinue their service between those points. And if those companies having their own rails from Peoria-Pekin to the east do not wish to participate with appellant in the publication of the joint rates here involved, their remedy is to cancel the rates. They cannot leave the rates in effect and secure the benefit of not having them in effect.

On page 44 of appellees' brief, it is said that if on traffic from Kansas City to Chicago,—

> "the Alton should have greater revenue on the shipment accorded transit than on the direct shipment, * * *, then the additional revenue should come from a separate charge for the transit rather than out of the eastern lines' revenue."

Certainly, appellant is entitled to greater total revenue on a shipment from Kansas City to Peoria and one from Peoria to Chicago, than on a through shipment from Kansas City to Chicago. The record definitely shows the greater service in the one case than in the other (R. 165, 166, 171), and the Commission has held that such additional service justifies higher divisions. *Waverly Oil Works* v. *Penna. R. Co.*, 28 I. C. C. 621; *Minnesota Western R. Co.* v. *A. T. & S. F. R. Co.*, 109 I. C. C. 127.

The suggestion that the additional revenue to which

appellant is thus entitled should come out of a separate charge for the transit service, imports into this case an issue not involved in the proceedings before the Commission and which the Commission did not suggest. It is indicative of the manner in which a majority of the Commission disposed of this case and of the grounds upon which the order on rehearing was based. We fail to see how a claim for higher divisions of a joint rate is met by a statement that the increased revenue sought should be secured by imposing a separate charge upon a different service which was not in issue and concerning which there was no evidence.

At the bottom of page 46 and the top of page 47 of appellees' brief, it is said that appellant did not ask the Commission to increase the divisions accorded to other lines hauling traffic to Chicago under the joint "reshipping" rates, but asked that appellant be given a special concession when it handled the traffic. This is incorrect. True, appellant did not ask for an increase in the divisions of other lines for obvious reasons, but certainly it has not requested that it be given any special concession. The argument seems to lead to the conclusion that because other railroads are satisfied with divisions which are concededly inadequate and insufficient, appellant should also be satisfied.

On page 47 of appellees' brief it is also said that the divisions of the joint "reshipping" rates may not be considered by themselves but must be considered in the light of the fact that the rates apply on shipments to and from a transit point. The report of the Commission on rehearing is cited in support of this assertion. We fail to follow this reasoning of the brief for the same reason that we have been unable to follow the reasoning of a majority of the Commission as contained in its final report in this proceeding. We reiterate that the only joint

rates to which appellant was a party, applied from Peoria-Pekin to the east and that these were the only rates a division of which was sought. The character of traffic upon which these rates applied and the manner of their application obviously can have no bearing upon the just distribution of the revenue accruing from them.

On page 48 of appellees' brief, it is said that the Commission found that the routes over which shipments would move from northwestern territory, via Peoria and Chicago over the Alton to the east, was circuitous. True, the Commission did so find, and it is also true that such a route is longer than the direct route from northwestern territory to the east via Chicago. But as we have pointed out in our main brief (pp. 67, 68), the routes via Peoria and Chicago are maintained voluntarily by the carriers for competitive and other reasons, and the propriety of those routes was not an issue before the Commission. And the election of the carriers as a whole to maintain rates over such routes certainly has no bearing on the proper division of the "reshipping" rates from Peoria-Pekin to the east.

At the top of page 49 of appellees' brief it is said that,—

> "The Commission declined to grant the Alton a division which would enable it to participate in this traffic via its northern junctions."

This is correct, as we have pointed out in our main brief (pp. 57-59). There is no claim in appellees' brief that the result sought to be produced by the Commission was justified by any evidence of record, or that the continued handling by appellant of traffic under the joint "reshipping" rates was an issue in the case. The language, in effect, concedes that although rates and routes were not in issue and there was no evidence concerning them, the Commission's order relates entirely thereto. It con-

cedes that the Commission has said to appellant, in effect, that although the Railroad Defendants are willing to continue the publication of the "reshipping" rates via appellant's line, appellant should still be prevented from participating in traffic under those rates. It is difficult to see how such a decision can be sustained on the merits.

At the bottom of page 49 of appellees' brief it is said:

> "Interchange of the traffic between the Alton and the eastern lines at junctions south of Chicago, Joliet, and Dwight will obviously tend to reduce the circuity of the route."

No reference is made to any evidence of record supporting this statement and, as we have heretofore pointed out, it is contrary to the evidence which is of record.

At the top of page 50, it is said:

> "The Commission did not hold that the Alton must participate in this traffic via its northern junctions at a zero division, but on the contrary it declined to grant the Alton a division which would enable it to participate in the traffic via those particular junctions."

True, the Commission did not by order require appellant to continue its handling of traffic under the joint "reshipping" rates. But that obligation rests upon appellant so long as the rates are in effect, as they now are and have been for years past. Appellant can only escape the burden laid upon it under the Commission's order by canceling its participation in the rates before it is properly determined that it should do so, thus foregoing one right in order to preserve another. We submit that the law does not require this.

On pages 54 and 55 of appellees' brief, it is argued that there is no confiscation of appellant's property under the Commission's order, since appellant has the right to cancel its participation in the joint "reshipping"

rates. Such an argument defeats itself. First, as we have pointed out, appellant is not compelled to preserve its constitutional rights by foregoing other rights to which it is equally entitled. Second, the right of appellant to cancel its participation in the joint "reshipping" rates is not clear and certain. It could only do so by tariff publication, and the Commission has jurisdiction to suspend such a tariff for seven months pending hearing. (Section 15 (7), Interstate Commerce Act, U. S. C. A., Title 49, Sections 1 to 15a, page 433). Upon such a hearing, with all interested parties present, the facts might be such that the Commission would decline to permit appellant to cancel the rates. In view of its decision in the case at bar, the Commission might not do these things, but it cannot be assumed that it would not do them. Appellant does not, therefore, have an absolute right to withdraw from the handling of the traffic and thus avoid confiscation of the property to which it is now subjected.

The argument that a confiscation of property is not a confiscation if it can be avoided by a withdrawal from the activity in connection with which the confiscation exists is new. Under it, a claim of confiscation as a result of a tax on property or occupation could be met by the claim that since the property could be sold or the occupation discontinued, the confiscation is not a confiscation. We submit that this is certainly not the law. So long as the joint "reshipping" rates here involved are in effect, we submit that appellant has a legal right to engage in transportation under them and cannot be compelled to forego that right without hearing in order to escape a confiscation of its property.

We do not contend that independently of the publication of the rates themselves, appellant has a vested right to participate in transportation under them, to haul traf-

fic to certain junctions, and to receive a compensatory division of those rates in all events. What we do say is that the right of appellant to participate in the traffic, to haul that traffic via certain junctions, and to receive a fair division of the rates, is fixed and determined by the publication of those rates by appellant and the Railroad Defendants, and that these rights cannot be questioned in this proceeding. Appellant's right to become a party to these rates, if it was not now a party, is not the issue.

We submit that upon the law and the facts the judgment of the lower court should be reversed.

Respectfully submitted,

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